IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34262

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 388**
	)	
Plaintiff-Respondent,	)	**Filed: March 18, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
DAVID SALINAS,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for possession of a controlled substance and possession of drug paraphernalia, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth A. Allred, Deputy Appellate Public Defender, Boise, for appellant. Elizabeth A. Allred argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

GUTIERREZ, Judge

David Salinas appeals from his judgment of conviction for possession of methamphetamine and possession of drug paraphernalia. Specifically, he challenges the district court's denial of his motion to suppress evidence. We affirm.

I.
FACTS AND PROCEDURE

Two probation and parole officers arrived at the residence of Joseph Mount, who was on probation for felony possession of a controlled substance and misdemeanor possession of drug paraphernalia and petit theft, to conduct a search pursuant to Mount's Fourth Amendment waiver as a condition of his probation. Mount was not present and Salinas opened the door, first telling the officers that he was just visiting the residence, but later telling them that he was moving in that day.

After some discussion regarding Mount's probationary waiver, Salinas moved aside and allowed the officers to enter the house. The officers proceeded to conduct a search of the residence, finding drug paraphernalia and what appeared to be methamphetamine residue in a box in a back bedroom. Salinas subsequently admitted the bedroom was his, after which he was handcuffed and read his *Miranda*[1] rights. Officers then discovered a backpack in the living room next to a bong containing methamphetamine residue. Without questioning Salinas about whose it was, the officers searched the bag. Inside, they found a small tin containing a baggie in which there was a blue pill. Salinas subsequently admitted to ownership of the backpack and the baggie and claimed he was holding the pill--which he identified as ecstasy--for a friend.

Salinas was charged with possession of a controlled substance, Idaho Code Section 37-2732(c),[2] and possession of drug paraphernalia, I.C. § 37-2734A.[3] He moved to suppress the evidence found during the search, contending that the search of the bedroom and the backpack violated his rights against unreasonable searches. After a hearing, the district court denied the motion, and Salinas entered a conditional guilty plea to the charges, reserving his right to appeal the district court's denial of his suppression motion. The district court entered a judgment of conviction and ultimately placed Salinas on probation after retaining jurisdiction. Salinas now appeals.

II.
ANALYSIS

In denying Salinas's suppression motion, the district court held that the search was not unreasonable where Mount had clearly consented to searches of his residence as a condition of probation and Salinas did not object to the search when it was occurring. Salinas, however, contends that Mount could not consent to the search of Salinas's personal belongings located in

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1 *See Miranda v. Arizona*, 384 U.S. 436 (1966).

2 Initially, Salinas was charged with possession of ecstasy, but the information was later amended to substitute the charge of possession of methamphetamine when the lab report on the pill found in the backpack indicated that it was methamphetamine.

3 The information specifically identified a "baggy [sic], used to store a controlled substance" as the paraphernalia Salinas was alleged to have possessed.

their shared residence, namely his backpack, over which Salinas maintained exclusive control, because Mount did not have either actual or apparent authority to do so.[4]

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

The Fourth Amendment to the United States Constitution, as well as article I, § 17 of the Idaho Constitution, prohibit unreasonable searches. While a warrantless search is presumptively unreasonable, it may still be permissible if it falls within an established exception to the warrant requirement or is otherwise reasonable under the circumstances presented. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *State v. Weaver*, 127 Idaho 288, 290, 900 P.2d 196, 198 (1995); *State v. Greene*, 140 Idaho 605, 607, 97 P.3d 472, 474 (Ct. App. 2004); *State v. McIntee*, 124 Idaho 803, 804, 864 P.2d 641, 642 (Ct. App. 1993). The state bears the burden to demonstrate that a warrantless search either fell within an exception or was otherwise reasonable given the circumstances. *State v. Martinez*, 129 Idaho 426, 431, 925 P.2d 1125, 1130 (Ct. App. 1996).

One such exception is properly given consent. *State v. Barker*, 136 Idaho 728, 730, 40 P.3d 86, 88 (2002); *State v. Johnson*, 110 Idaho 516, 522, 716 P.2d 1288, 1294 (1986). When the state seeks to justify a warrantless search based upon consent, it is not limited to proof that the consent was given by the defendant. *Id*. It may show that the consent came from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *United States v. Matlock*, 415 U.S. 164 (1974); *Barker*, 136 Idaho at 731, 40 P.3d at 89. The authority to consent to a search is not derived from the law of

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[4] In his motion to suppress, Salinas requested that evidence found both in the bedroom and the backpack be suppressed. However, the charges to which he pled guilty related only to the evidence found in the backpack and on appeal, he requests only that we reverse the district court's denial of his motion in regard to evidence found during the search of his backpack. Thus, we will only consider the legality of the search of the backpack.

property (e.g., ownership), but is based upon common authority over the property to be searched. *Id*. That common authority rests upon the mutual use of the property by persons generally having joint access or control over it for most purposes. *Id*.

In *Barker*, 136 Idaho 728, 40 P.3d 86, the Idaho Supreme Court examined a case involving drugs discovered in a fanny pack found during a warrantless search of Barker's apartment.[5] There, after finding John Tate, Barker's probationer boyfriend, outside her residence and after gathering evidence that he was residing with her, officers conducted a search of the apartment upon Tate's Fourth Amendment waiver as a probationer. In the master bedroom--where both men's and women's clothing was hanging in the closet--a drug dog alerted to the fanny pack in question. An officer contacted Barker, and she told him that it was hers. The officer opened the pack and discovered methamphetamine and a vehicle title with both Barker's and Tate's names on it, leading to charges against Barker for possession of the drug. On appeal, this Court held that search of the fanny pack violated Barker's Fourth Amendment rights because the state had not shown that Tate--upon whose consent the officers relied to justify the search--owned or had joint access or control over it. The Supreme Court reversed, holding that under the totality of the circumstances, the officer had reasonable suspicion to believe that Barker's boyfriend had common authority over the fanny pack. In coming to this conclusion, the Court stated that:

> Because both Tate and Barker occupied the master bedroom, Tate had common authority over the bedroom sufficient for him to consent to a search of that room. His consent to search could not extend to items in the bedroom over which he had no common authority, however. When searching that room pursuant to Tate's consent, the officers could search any item in the bedroom if they had reasonable suspicion that Tate owned, possessed, or controlled the item. *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991). The circumstances need not indicate that the item was obviously and undeniably owned, possessed, or controlled by Tate. *Id*. When searching a residence pursuant to the consent of only one of the occupants, the officers are not required in all instances to inquire

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[5] We are troubled by the fact counsel for Salinas did not cite to *State v. Barker* in her initial appellate brief--nor did she reference the case at oral argument until prompted by this Court--despite the fact that *Barker* is closely analogous and binding on this Court regarding the issue at hand. Counsel, in her reply brief, attempts to justify why *Barker* was not cited in the initial appellate brief. We note that attorneys before this Court are required to cite controlling authority. Citing only to the persuasive (but non-binding) authorities that were cited in a particular controlling Idaho case does not satisfy an attorney's duty to cite the controlling case itself.

> into the ownership, possession, or control of an item when ownership, possession, or control is not obviously and undeniably apparent. *Id*. If the officers do inquire, they are not necessarily bound by the answer given. *Id*. The test is whether, under the totality of the circumstances, the officers had a reasonable suspicion that the item was owned, possessed or controlled by the occupant who consented to the search.
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> Barker's statement that she owned the fanny pack is not determinative of the issue of whether or not the officer could search the fanny pack. As stated above, authority to consent to a search is not based upon having a property right in the item to be searched. It is based upon having authority over that item. Even if the officer believed that Barker owned the fanny pack, that fact would not necessarily preclude Tate having joint possession or control of it. Furthermore, officers had reason to doubt Barker's credibility.
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> We hold that under the totality of the circumstances the officer had reasonable suspicion to believe that Tate had common authority over the fanny pack. Tate was on parole for the charge of possession of a controlled substance. Prior to absconding from supervision, he had submitted a urine sample to his parole officer that tested positive for a controlled substance. His parole officer could certainly reasonably believe that Tate had resumed using controlled substances. The fanny pack was located in the bedroom which was occupied jointly by Tate and Barker. It was sitting on a counter near the adjoining bathroom, where it was readily available. There was nothing about its location or appearance that would indicate that it was owned, possessed, and controlled exclusively by Barker. A drug dog alerted to the fanny pack, and there was no reason to believe that Barker was using controlled substances. Under these facts, the officer could reasonably have suspected that Tate had at least joint possession or control of the fanny pack. . . .

Barker, 136 Idaho at 731-32, 40 P.3d at 89-90.

On appeal, Salinas urges us to adopt the rule that officers are required to conduct a "reasonable inquiry" as to the ownership of items to be searched in instances like those presented in the case at hand. However, in *Barker*, the Supreme Court explicitly stated that officers are not required in "all circumstances to inquire into the ownership, possession, or control of an item" even when "ownership, possession, or control is not obviously and undeniably apparent," and even if they do inquire, "they are not necessarily bound by the answer given." *Id*. at 731, 40 P.3d at 89.

Applying *Barker* to the case at hand, we conclude that the facts of this case cannot be meaningfully distinguished. There, the Supreme Court upheld the search of a similar item found in a common space not unlike the common space where the backpack was located here in that

both Mount and Salinas apparently had shared access to the space. Notably, the personal nature of the backpack searched here is not unlike the fanny pack in *Barker*--from an objective point of view both items would often be assumed to be under the control of one person--as opposed to all the residents of a house. This factor, however, did not preclude the *Barker* Court from concluding that the officers' assumption that the fanny pack was under the control of Tate was reasonable--even in light of Barker's explicit statement that the pack belonged to her. As in *Barker*, there was nothing about the appearance or location of the backpack that "would indicate that it was owned, possessed, and controlled exclusively by [Salinas]." And even more convincingly in this case, Salinas did not claim ownership of the backpack prior to its search--unlike Barker--and he related contradictory stories to the officers regarding whether he was a resident or was just visiting--giving officers reasonable doubt as to his connection to the property and his access to or ownership of items in the residence. Furthermore, the backpack was found next to a bong containing methamphetamine residue, giving the officers reason to believe that Mount controlled the bag where they knew he was on probation for both possession of a controlled substance and possession of drug paraphernalia. *See Barker*, 136 Idaho at 732, 40 P.3d at 90 (indicating that where a drug dog had alerted to a fanny pack, it was reasonable for the officers to believe that Tate had control over the bag since he was known to be a drug user on parole for possession of a controlled substance). In sum, applying our Supreme Court's analysis in *Barker*, we conclude that under the totality of the circumstances, the officers had a reasonable suspicion that the item was owned, possessed, or controlled by Mount and therefore, were justified in searching the bag under his consent as a probationer.

We conclude the district court did not err in denying Salinas's motion to suppress evidence. We therefore, affirm Salinas's judgment of conviction for possession of a controlled substance and possession of drug paraphernalia.

Chief Judge LANSING and Judge PERRY **CONCUR**.